Supreme Court, U.S.
FILED
APR 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1456

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PLUMBERS' PENSION FUND, LOCAL 130, U.A., PLUMBERS' WELFARE FUND, LOCAL 130, U.A., THE TRUST FUND FOR APPRENTICE AND JOURNEYMAN EDUCATION AND TRAINING, LOCAL 130, U.A.,

Petitioners,

v.

ROBERT NIEDRICH and DENISE NIEDRICH,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DANIEL R. MURRAY
Counsel of Record
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

Attorney for Respondents

Of Counsel:

JOHN J. DUNBAR
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court of appeals correctly declined to expand the provisions of ERISA to make a corporate officer personally liable for pension contributions under an ERISA provision imposing liability only upon "employers" who are "obligated" to make contributions.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	2
JURISDICTION	2
STATEMENT	2
REASONS FOR DENYING THE WRIT	3
A. The Courts Agree That Officers Like The Niedrichs Are Not Liable Under § 515	5
B. Section 515's Requirement Of A Contractual Obligation Means What It Says	6
C. The Legislative History Also Shows That A Contractual Obligation Is Required	9
D. Section 515 Was Not Intended To Revoke The Long Established Principle Of Limited Corporate Liability	11
E. Any Similarities To The FLSA Cannot Void § 515's Requirement Of A Contractual Obligation	12
F. Public Policy Supports The Position Of The Courts Of Appeal	13
CONCLUSION	15

TABLE OF AUTHORITIES

Cases	PAGE
Alman v. Danin, 801 F.2d 1 (1st Cir. 1986) ...	11
Alman v. George Mfg. Co., 680 F. Supp. 56 (D. Mass. 1988)	5
DeBreceni v. Graf Bros. Leasing, Inc., 828 F.2d 877 (1st Cir. 1987), *cert. denied*, 484 U.S. 1024 (1988)	14
International Brotherhood of Painters v. George A. Kracher, Inc., 856 F.2d 1546 (D.C. Cir. 1988)	4, 10, 11, 12, 13
Kaiser Steel Corp. v. Mullins, 455 U.S. 72 (1982) ..	10
Laborers Health and Welfare Trust Fund For Northern California v. Advanced Lightweight Concrete Co., 484 U.S. 539 (1988)	7-9, 10
Leddy v. Standard Drywall, Inc., 875 F.2d 383 (2d Cir. 1989)	6
Levit v. Ingersoll Rand Financial Corp., 874 F.2d 1186 (7th Cir. 1989)	4, 14
Lowen v. Tower Asset Management, Inc., 829 F.2d 1209 (2d Cir. 1987)	11
Mason Tenders Dist. Council Welfare Fund v. Dalton, 648 F. Supp. 1309 (S.D.N.Y. 1986)	10, 11
Massachusetts Laborers Health & Welfare Fund v. Starrett Paving Corp., 845 F.2d 23 (1st Cir. 1988)	4, 7, 10, 12, 13, 14
Operating Engineers Pension Plan Fund v. Reed, 726 F.2d 513 (9th Cir. 1984)	4
Plumbers Pension Fund Local 130, U.A. v. Niedrich, 891 F.2d 1297 (7th Cir. 1989)	2, 3, 4, 7, 11, 12

Plumbers Pension Fund Local 130 U.A. v. Niedrich, 701 F. Supp. 651 (N.D. Ill. 1988) 2, 3, 6-7, 12

Rockney v. Blohorn, 877 F.2d 637 (8th Cir. 1989) .. 4, 13

Rubenstein v. Tri-State Transport, Inc., 646 F. Supp. 1 (D. Mass. 1984) 5

Scarborough v. Perez, 870 F.2d 1079 (6th Cir. 1989) 4

Serembus v. Comfort Lines, Inc., 689 F. Supp. 1496 (N.D. Ill. 1988) 5

Solomon v. Klein, 770 F.2d 352 (3d Cir. 1985) .. 4

Walter E. Heller & Co. v. Video Innovations, Inc., 730 F.2d 50 (2d Cir. 1983) 6

West Virginia-Ohio Valley Area IBEW Welfare Fund v. Ball Electric Co., 685 F. Supp. 953 (S.D. W.Va. 1988) 5

Statutes

28 U.S.C. § 1254(1) 2

29 U.S.C. § 158(a)(5) 8

29 U.S.C. § 1002(5) 3, 12

29 U.S.C. § 1145 ..... *passim*

29 U.S.C. § 1381(a) 9

Fair Labor Standards Act of 1938, June 25, 1938, c. 676, 52 Stat. 1060, now codified at 29 U.S.C. §§ 201-219 ..... 6, 12-13

Multiemployer Pension Plan Amendments Act of 1980, September 26, 1980, Pub.L. No. 96-364, 94 Stat. 1208 14

Miscellaneous

Opinion Letter No. 82-38 of the General Counsel of the Pension Benefit Guaranty Corporation (Dec. 14, 1982) 4, 12

No. 89-1456

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PLUMBERS' PENSION FUND, LOCAL 130, U.A., PLUMBERS' WELFARE FUND, LOCAL 130, U.A., THE TRUST FUND FOR APPRENTICE AND JOURNEYMAN EDUCATION AND TRAINING, LOCAL 130, U.A.,

Petitioners,

v.

ROBERT NIEDRICH and DENISE NIEDRICH,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Respondents Robert and Denise Niedrich ("Niedrichs"), by their attorneys, submit this brief in opposition to the petition for a writ of certiorari by three pension and benefit funds ("Funds").

OPINIONS BELOW

The opinion of the court of appeals (Petn. App. 1a-11a) is reported at 891 F.2d 1297. The opinion of the district court (App. 1c-10c) is reported at 701 F.Supp. 651.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1989. (App. 1b). The writ of certiorari was filed on March 19, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The Funds filed their action for unpaid contributions under § 515 of the Employee Retirement Income Security Act ("ERISA"), which makes an "employer who is obligated to make contributions" liable for unpaid contributions. 29 U.S.C. § 1145.[1] The obligation to make contributions in this case arose from a collective bargaining agreement between a union and Rob Roy Plumbing, Inc. ("Rob Roy").

[1] Section 515 provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with terms and conditions of such plan or such agreement.

29 U.S.C. § 1145.

(App. 2c). The Niedrichs were not parties to the agreement, and the Funds conceded that no facts warranted piercing the corporate veil or treating Rob Roy as the Niedrichs' alter ego. (App. 4a, 9a).

The district court dismissed the complaint, and the court of appeals affirmed. (App. 9c, 10c, 10a-11a). As both courts properly found, because the Niedrichs have no contractual obligation to the Funds, and because there is no reason to pierce the corporate veil, the Niedrichs are not liable under § 515. (*Id.*)

REASONS FOR DENYING THE WRIT

The decisions below were in accord with decisions by six other circuits. There is no split in the circuits here, and no reason to grant this petition. As both the district court and the court of appeals recognized, whether or not the Niedrichs are "employers" under 29 U.S.C. § 1002(5), they still are not liable under § 515 of ERISA. (App. 7c, 7a-8a). As the court of appeals correctly reasoned, § 515 does not impose liability on *all* employers. (App. 8a). Instead, § 515 imposes liability only on the "employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or the terms of a collectively bargained agreement. . . ." 29 U.S.C. § 1145.

The Funds have never argued that the terms of the collective bargaining agreement imposed any duty on the Niedrichs to contribute to the Funds, and the Funds conceded below that no facts warrant piercing the corporate veil or treating Rob Roy as the Niedrichs' alter ego. (App. 4a). Instead, as they did below, the Funds argue that, in enacting ERISA, Congress meant to discard these traditional, limited exceptions to the principle of corporate

liability and broadly impose personal liability on corporate officers for obligations of the corporation. (Petn. 14, 15). What the Funds brush over is that every United States Court of Appeals that has decided the issue has rejected the Funds' argument.

In fact, seven circuits have rejected the Funds' position, because: (1) corporate officers like the Niedrichs are not "employers" under ERISA, and therefore are not covered by § 515; and/or (2) whether or not officers are "employers" under ERISA, § 515 does not impose liability on officers, like the Niedrichs, who are not contractually obligated to make contributions.[2] Though the analyses used by these courts have differed slightly, the result always has been the same: an individual who is not contractually obligated to contribute to a multiemployer pension plan will not be liable for the corporation's obligations unless the corporation acts as alter ego of the individual or facts exist that warrant piercing the corporate veil.

---

[2] *Plumbers Pension Fund Local 130, U.A. v. Niedrich*, 891 F.2d 1297, 1299-1301 (7th Cir. 1989) (officer had no contractual obligation); *Rockney v. Blohorn*, 877 F.2d 637, 642 (8th Cir. 1989) (officer not an employer, non-parties to agreement are not liable); *Levit v. Ingersoll Rand Financial Corp.*, 874 F.2d 1186, 1193 (7th Cir. 1989) (officer had no contractual obligation); *Scarborough v. Perez*, 870 F.2d 1079, 1082-84 (6th Cir. 1989) (officer not an employer and had no contractual obligation); *International Brotherhood of Painters v. George A. Kracher, Inc.*, 856 F.2d 1546, 1547-50 & n.12 (D.C. Cir. 1988) (same); *Massachusetts Laborers Health & Welfare Fund v. Starrett Paving Corp.*, 845 F.2d 23, 25-27 (1st Cir. 1988) (officer had no contractual obligation); *Solomon v. Klein*, 770 F.2d 352, 354 (3d Cir. 1985) (officer not an employer); *Operating Engineers Pension Plan Fund v. Reed*, 726 F.2d 513, 515 (9th Cir. 1984) (Kennedy, J.) (same). An opinion by the general counsel of the agency charged with insuring multiemployer pension funds, who interpreted an analogous provision of ERISA, is in accord. General Counsel of the Pension Benefit Guaranty Corp. ("PBGC"), Opinion Letter 82-38 (Dec. 4, 1982) (App. 1d-2d).

As the Funds concede, an examination of these decisions reveals that there is no "true conflict" among the circuits. (Petn. 17). The decisions are in accord with decisions of this Court. The issue also is not important enough to warrant review. The dire consequences foreseen by the Funds (Petn. 16-17) can be avoided if funds take the simple measure of requiring personal guarantees from key corporate officials. Thus, there is no reason for this Court to consider the issues raised in this petition.

Nevertheless, the Funds attempt to escape the statute's controlling language with six different arguments. Each of these arguments has been shown to be invalid, either by the Seventh Circuit in this case or by one of the six other circuits that have decided the issue here.

A. The Courts Agree That Officers Like The Niedrichs Are Not Liable Under § 515.

First, the Funds contend that there is substantial disagreement among the lower courts about the meaning of § 515. (Petn. 9-12). To support this assertion, the Funds cling to several overruled district court decisions within the Seventh Circuit,[3] as well as several overruled decisions by the District of Massachusetts[4] and one decision by the Southern District of West Virginia.[5] All but the last of these decisions have had the rug pulled out from

---

[3] *E.g., Serembus v. Comfort Lines, Inc.*, 689 F. Supp. 1496, 1498 (N.D. Ill. 1988) (collecting cases).

[4] *E.g., Rubenstein v. Tri-State Transport, Inc.*, 646 F. Supp. 1, 2 (D. Mass. 1984); *but see Alman v. George Mfg. Corp.*, 680 F. Supp. 56, 58 (D. Mass. 1988) (rejecting earlier decisions from the District of Massachusetts because they ignored requirement that employer be contractually obligated).

[5] *West Virginia-Ohio Valley Area IBEW Welfare Fund v. Ball Electric Co.*, 685 F. Supp. 953, 954-55 (S.D. W.Va. 1988).

under them. A contrary decision from one district court does not create a conflict worthy of review.

Attempting to split the wall of authority before them, the Funds also contend that the Second Circuit is leaning in the direction favored by the Funds. The Funds, however, cite only *Leddy v. Standard Drywall, Inc.*, 875 F.2d 383, 388 (2d Cir. 1989). (Petn. 12). In *Leddy*, a company president who had been sued under § 515 had already pled guilty to federal criminal charges resulting from his scheme to defraud the plaintiff benefit funds through the use of dummy "alter ego" corporations. *Id.* at 384, 385, 387. As the Second Circuit found, because the president had engaged in a criminal conspiracy to defraud the funds, there was no need to decide whether to equate the scope of ERISA with that of the Fair Labor Standards Act ("FLSA"). *Id.* at 387.

In this case, the Funds have never alleged any fraud by the Niedrichs. Moreover, corporate law has long provided that the corporate form may not be used as a shield for fraud. *E.g., Walter E. Heller & Co. v. Video Innovations, Inc.*, 730 F.3d 50, 53-54 (2d Cir. 1983). Thus, the Second Circuit's opinion in *Leddy* is consistent with the seven other circuits' position that corporate officers can be liable for the contributions the corporation is obliged to make only if there is evidence supporting a traditional exception to the principle of limited corporate liability.

B. Section 515's Requirement Of A Contractual Obligation Means What It Says.

Second, the Funds argue that the court of appeals misconstrued § 515 by interpreting the language "employer who is obligated to make contributions" as imposing liability only on those with a contractual obligation to make the contributions. However, as the district court noted,

in addition to the word "obligated," § 515 emphasizes contracts no less than four times. (App. 4c). The statute here plainly expresses the requirement of a contractual obligation, and that language cannot be ignored. Nevertheless, according to the Funds, § 515 is entitled to a much broader reading. Although § 515 makes absolutely no mention of employers "who exercise control over plan contributions," the Funds contend that § 515 should be read creatively to ensnare such individuals within its net. (Petn. 13-14). In support of this expansive interpretation, the Funds contend that the phrase "employer who is obligated" is not designed to limit "applicable employers," and instead is only intended to limit "applicable benefit plans." (Petn. 13).

The Funds never made this argument to the district court and the argument was not considered in the decision by the court of appeals. In any event, the same argument has been made—and soundly rejected—before. Like the Funds here, the funds in *Starrett* argued that the words "obligated to make contributions" are words of "explanation, not limitation." 845 F.2d at 26. Unpersuaded, the First Circuit responded that "even if we take these words as words of 'explanation,' they seem to explain *whom* ERISA obliges and we can find nothing else in the statute that imposes an ERISA obligation to contribute on persons whom state law (or some other law) does *not* oblige." *Id.* (emphasis in original).

The Funds cite only one decision for their view that § 515 is "descriptive only," and in that case this Court rejected an argument very similar to the one made by the Funds in this case. *Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988) (Petn. 14). Though the Funds quote language from the Court's opinion, the quoted language is taken completely out of context.

In *Advanced Lightweight Concrete*, this Court affirmed dismissal of an action by pension funds which claimed that an employer's decision to withdraw from a multiemployer plan constituted a breach of its duty to bargain in good faith under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(5). Though the NLRA vests exclusive jurisdiction over such disputes in the National Labor Relations Board ("NLRB"), the funds argued that the district court had jurisdiction under two ERISA provisions, including § 515. This Court disagreed, unanimously holding that the remedy afforded by § 515 is "limited to the collection of 'promised contributions,' " 484 U.S. at 541, and that the text of § 515 "plainly describes the employer's contractual obligation to make contributions but omits any reference to a non-contractual obligation imposed by the NLRA." *Id.* at 546.

Like the Funds here, the funds in *Advanced Lightweight Concrete* argued that § 515's "operative phrase," *i.e.*, "employer who is obligated to make contributions . . . under the terms of a collectively bargained agreement," could be read to mean employers "whose contributions are *defined and measured by the terms* of a collective bargaining agreement, but whose obligation to contribute exists as a matter of law, independent of the contract." *Id.* at 549-50 n. 16 (emphasis added by the Court). This Court flatly disagreed.

> So read, § 515 would require employers to adhere to all legal duties to make contributions to collectively-bargained plans. In other words, [the funds] construe the word "under" to mean "defined and measured by," and read "obligated" to include both contractual and statutory duties. But if Congress had meant to say this, surely it could have done so more clearly; as written, § 515 plainly refers to obligations that

> themselves arise from either a "plan" or a "collectively bargained agreement."

Id.

Despite this clear rejection of a position very similar to their own, the Funds cite a portion of a sentence from the Court's opinion for the proposition that "§ 515 provides only for a contractual *origin* for delinquency liability," *id.* (emphasis added by Funds) (Petn. 14), as if this meant that it would be appropriate to disregard the original contractual obligation and impose broader liability. In fact, the Court recited this language when it rejected an argument that § 515 could be used to create a statutory cause of action.[6] Accordingly, *Advanced Lightweight Concrete* provides no support for the Funds' position.

The Funds' attempt to ignore the plain language of § 515 must be rejected. The Niedrichs were not parties to the collective bargaining agreement, and the Funds may not avoid this fact by rewriting the statute on which their claim is based.

C. The Legislative History Also Shows That A Contractual Obligation Is Required.

Third, the Funds argue that the legislative history supports their attempt to read out of the statute the plain lan-

---

[6] The Court rejected the funds' analogy between ERISA's delinquency and withdrawal liability provisions, reasoning that "while withdrawal liability [under 29 U.S.C. § 1381(a)] may arise from both contractual and statutory duties, § 515 provides only for a contractual origin for delinquency liability." 484 U.S. at 550 n. 16. As the Court explained, "the fact that Congress intended withdrawal and delinquency liability to have similar remedies [does not lead] to the erroneous conclusion that withdrawal and delinquency liability are themselves equivalent because both originated in contractual and statutory duties." *Id.* In fact, "§ 515 provides only for a contractual origin for delinquency liability." *Id.*

guage that requires a contractual obligation. In *Advanced Lightweight Concrete*, this Court repeatedly stressed that § 515 was intended to apply to "contractual obligations," and did not impose non-contractual statutory obligations. 484 U.S. at 547-49 & n. 15. To make its point, the Court quoted numerous sections of the legislative history, and repeatedly underscored language indicating that liability would be imposed upon employers who had *contractually promised* to make contributions. Id. at 548-49 nn. 14-15.

Several courts of appeal have correctly pointed out that the legislative history offers no support for the Funds' position. *E.g.*, *Kracher*, 856 F.2d at 1550; *Starrett*, 845 F.2d at 25. As the First Circuit has observed, the "statute's language quite clearly states that the duty in § 515 arises only in respect to employers 'obligated' to make the contributions," and the legislative history of § 515 "indicates that the language means what it says." 845 F.2d at 25. Thus, "even if we do our best to read the history through the eyes of the Plans . . . we can find nothing that suggests we should not follow that statute's plain meaning." *Id.* at 26.

As the D.C. Circuit has explained, the legislative history shows that § 515 "was added to ERISA to simplify litigation, not to expand the universe of potential defendants." *Kracher*, 856 F.2d at 1549. The purpose of § 515 was to "ensure that courts do not permit contractually obligated defendants to obstruct garden-variety collection actions by alleging defenses unrelated to the contractual commitments to make benefit payments." *Mason Tenders Dist. Council Welfare Fund v. Dalton*, 648 F. Supp. 1309, 1312 (S.D.N.Y. 1986) (decision for corporate officer vacated pursuant to settlement); *see also Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 87 (1982). None of the defenses criticized in the legislative history have anything to do with the

settled principle standing in the Funds' way here: that a corporate officer who was not a party to the contract cannot be personally liable for his corporation's contractual obligations. *See Dalton*, 648 F. Supp. at 1312. Thus, far from supporting the Funds' attempt to avoid the plain language of the statute, the legislative history positively squelches that attempt.

D. Section 515 Was Not Intended To Revoke The Long Established Principle Of Limited Corporate Liability.

Fourth, the Funds attempt to escape the long established principle of limited corporate liability by arguing that nothing in ERISA exculpates individuals from liability. (Petn. 8-9). This argument confuses the exception with the rule. As several courts of appeal have pointed out, limited liability is a cornerstone of corporate law. *E.g.*, *Kracher*, 856 F.2d at 1550. Thus, "surely if Congress had decided to alter such a universal and time honored concept, it would have signalled that resolve somehow in the legislative history." *Id.* Here, no such signal can be found, either in the statute or the legislative history.

There are, of course, well-established limits on the principle of limited liability. When individuals misuse the corporate form, the corporate veil can be pierced or an alter ego claim can be stated. *Cf. Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209, 1221 (2d Cir. 1987) (piercing the corporate veil on traditional grounds); *Alman v. Danin*, 801 F.2d 1, 3-4 (1st Cir. 1986) (same). However, as the court of appeals noted, the Funds conceded that there were no grounds for piercing Rob Roy's corporate veil. (App. 4a). There being nothing improper about the Niedrichs' use of the limited liability defense, there is no reason to disregard it.

E. Any Similarities To The FLSA Cannot Void § 515's Requirement Of A Contractual Obligation.

Fifth, the Funds argue that because the FLSA's definition of "employer" is similar to that used in ERISA, case law interpreting the FLSA provision automatically governs the ERISA provision. (Petn. 8-9). As the court of appeals correctly held, however, inferences based upon a few words imported from the FLSA cannot undo a consistent interpretation of § 515 reached by every circuit to consider the issue as well as the PBGC. (App. 9a). Several reasons noted by other courts also serve to reject this argument.

First, as the district court correctly observed, § 515 has no parallel provision in the FLSA—no FLSA provision requires that employers already be "obligated" to pay a minimum wage. (App. 7c).

Second, as the First Circuit has explained, even if the definition of employer in § 1002(5) were broader, recognizing § 515's plain requirement of a contractual obligation does not render § 1002(5) a nullity, because any expanded definition of employer in that provision would still make a difference in other ERISA provisions. *Starrett*, 845 F.2d at 25-26.

Third, as several courts of appeal have concluded, the analogy to the FLSA is erroneous for an even more basic reason: the purpose of each statute is fundamentally different. *E.g.*, *Kracher*, 856 F.2d at 1549; *cf. Starrett*, 845 F.2d at 26. Whether viewed from the perspective of the employer or the employee, each statute imposes different obligations and creates different rights and different levels of economic power to enforce those rights.

From the employer's perspective, its obligations under the two statutes are quite different. The FLSA requires

the employer to pay a specified minimum wage and overtime compensation. ERISA, by contrast, does not require the employer to provide a pension plan or even to contribute to one. Instead, the obligation to provide pensions is voluntary, springing from privately made contracts found in collective bargaining agreements. *Kracher*, 856 F.2d at 1549. Because employers are not bound to participate in a plan, exposing officers and shareholders to personal liability may lead to a result never intended by Congress—a refusal to participate in multiemployer plans. *Rockney*, 877 F.2d at 642-43.

The perspective of the worker is also quite different. The Funds argue that ERISA should be treated like the FLSA because both statutes aim to protect workers by securing the payments due to them. (Petn. 9). However, unlike a worker seeking to protect his or her right to a minimum wage, a worker seeking to protect pension and benefit rights does not stand alone. Benefit funds, which typically identify closely with the unions that negotiate collective bargaining agreements on the funds' behalf, have far more power to protect themselves than do individual workers, including the power to secure a written promise of personal liability from the owner of a shaky corporation. *See Starrett*, 845 F.2d at 26.

Given these basic differences between ERISA and the FLSA, there is no reason to disturb the decisions by seven court of appeals that § 515 does not apply to persons like the Niedrichs.

F. Public Policy Supports The Position Of The Courts Of Appeal.

Sixth, having found no support in the statutory language or the legislative history, the Funds turn to their own

view of public policy, and argue that the unanimous position of the courts of appeal imperils the private pension system, the PBGC, and even the Social Security system. (Petn. 16-17). As the First Circuit correctly observed, this argument should be addressed to Congress, not this Court. *Starrett*, 845 F.2d at 26. But even if this argument is considered, it conflicts with economic reality.

Section 515 was added to ERISA by the Multiemployer Pension Plan Amendments Act ("MPPAA"), which reflects a balance between a short term strategy of imposing burdens on current employer contributors and a long term strategy of encouraging new employers to participate in multiemployer pension funds. *DeBreceni v. Graf Bros. Leasing, Inc.*, 828 F.2d 877, 880 (1st Cir. 1987) (declining to hold that "employer" includes controlling shareholders and officers for purposes of MPPAA withdrawal liability), *cert. denied*, 484 U.S. 1024 (1988). Imposing personal liability for delinquent payments would hurt that long term strategy by discouraging controlling individuals from directing their corporations to participate in multiemployer pension plans. *Cf. id.* Few individuals will be willing to participate in multiemployer plans if the cost may mean full individual liability, including loss of their homes and life savings.

Finally, if the Funds are truly concerned that the lack of automatic personal liability in the statute will cause the drastic consequences depicted by the Funds (Petn. 16-17), the Funds can demand personal guarantees from corporate officers with control over pension contributions. *Cf. Levit*, 874 F.2d at 1193; *Starrett*, 845 F.2d at 26. Accordingly, public policy reasons provide scant support for rejecting the plain language of the statute. Given the agreement by seven courts of appeal, there is no reason to grant this petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DANIEL R. MURRAY
Counsel of Record
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

Attorney for Respondents

Of Counsel:

JOHN J. DUNBAR
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

Dated: April 16, 1990